MOHD. TAIB HJ. IBRAHIM & ANOR.

v.

PERWIRA HABIB BANK (M) BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
SYED AGIL SCJ
[CIVIL APPEAL NO. 247 OF 1986]
18 AUGUST 1987

CIVIL PROCEDURE: *Default judgment - Application to set aside - Whether serious questions of law involved.*

This was an appeal by the appellants against the refusal by the learned Judge to set aside a default judgment dated 2 June 1984 entered against the appellants.

Held:

[1] The appellants had succeeded in raising serious questions of law which merited mature consideration.

[2] The issues could more appropriately be decided by way of the hearing of a preliminary issue without a full trial with witnesses.

[3] The appellants were given unconditional leave to defend the action.

Case referred to:
Osman bin Abdul Ghani & Ors. v. United Asian Bank Bhd. [1987] CLJ (Rep) 261

For the appellants - Krishna Aiyar; M/s. Majid, Krishna, Menon & Lee
For the respondents - J. Doshi; M/s. Tunku Zuhri, Manan & Abdullah

JUDGMENT

George Seah SCJ:

We allowed the appeal, set aside the default judgment dated 2 June 1984 and ordered that the appellants be given unconditional leave to defend. Here are our reasons for doing so.

The respondents are a licensed bank carrying on business in Kuala Lumpur. On 9 May 1978 the appellants executed a letter of guarantee to be jointly and severally liable to the respondents for due repayment of the loan of Malbina Sdn. Bhd. together with interest, charges commission and costs. It appeared that on 20 July 1977, Ashaari bin Hj. Ahmad, Kamaruddin bin Suleiman, Lim Sin Kit and Norimah binti Hj. Ahmad, the 1st, 2nd, 3rd and 4th defendants in the Court below, also signed a letter of guarantee, jointly and severally guaranteeing to the respondents due repayment of all moneys which shall at any time be due to the respondents from Malbina Sdn. Bhd. together with interest, charges, commission and costs.

On 11 February 1982 the respondents obtained judgment against Malbina Sdn. Bhd. for the sum of RM141,222.52 together with interest and costs *vide* Kuala Lumpur High Court Civil Suit No. C 186/1979. By a letter dated 8 July 1983 addressed to each of the four defendants abovementioned as well as the appellants herein, the respondents demanded payment of the said judgment sum of RM141,222.52 and interest thereon. When all the four defendants and

the appellants failed to settle the judgment sum and interest the respondents took out a writ against all the six of them. Judgment in default of defence was entered against both the appellants on 2 June 1984.

Application was made to set aside the default judgment. Firstly, it was submitted by learned Counsel for the appellants that when they executed the letter of guarantee on 9 May 1978 there was no consideration and if there were consideration, it was based on past consideration. The respondents filed an affidavit in reply stating, *inter alia*, that they were in the midst of commencing legal proceedings against Malbina Sdn. Bhd. unless the outstanding debt was paid by 31 January 1978. As Malbina Sdn. Bhd. were unable to repay the debt and in order to allow the respondents to forbear from instituting legal action the appellants executed the letter of guarantee aforesaid. It is pertinent to note that both the appellants were not appointed directors of Malbina Sdn. Bhd. until 4 April 1978 (see p. 49 of the record). In *Osman bin Abdul Ghani & Ors. v. United Asian Bank Bhd.* [1987] CLJ (Rep) 261 this Court held that forbearance could be inferred from the facts of the case. There the respondent bank was on the verge of suing the company (principal debtor) but was willing to forbear when the appellants, who were directors of the company at the material time, gave the second guarantee. Clearly, the second guarantee was given for the benefit of the company by giving the company time to arrange for the payment of the debt. Here, when the respondents threatened to sue Malbina Sdn. Bhd. by 31 January 1978 both the appellants were not directors of the company. Nor was there any evidence to indicate that they were in any way connected with the company at the material time. Secondly, learned Counsel for the appellants argued that the letter dated 28 April 1978 (see p. 50 of the record) and addressed to the respondents was request for a "temporary" overdraft of RM50,000 and not for a "continuing" overdraft facilities. Lastly, it was contended by learned Counsel for the appellants that if the appellants were to be held legally liable their liability should be limited to the maximum sum of RM50,000 only.

The learned Judge did not appear to attach any legal significance to the differences between "temporary" and/or "continuing" overdraft and therefore did not seem to have considered them in his judgment. However, the learned Judge disposed of these submissions in this manner:

> Paragraphs 11 and 13 of encl. 21 set out the circumstances in which the 5th and 6th defendants (the appellants in this appeal) came to be guarantors and demonstrate without challenge that the consideration for the guarantee was forbearance to sue and the allowing of the principal borrower to continue to use the overdraft facility. The bank statements exhibited show that the principal debtor was allowed to increase the amount outstanding from RM94,374.07 on 8 May 1978 to RM132,979.13 by 31 May 1978 which increase was effected after the execution of the guarantee by the 5th and 6th defendants ...

In our judgment, the appellants had succeeded in raising serious questions of law which merited mature consideration. The issues could more appropriately be decided by way of the hearing of a preliminary issue without a full trial with witnesses. For these reasons, we disagreed with the learned Judge and gave unconditional leave to the appellants to defend the action.

Also found at [1987] 2 CLJ 196